Loo Sze Kin v Cheong Choy Teik

HIGH COURT (KOTA KINABALU) — SUIT NO K22-193 OF 1994
IAN CHIN J
13 APRIL 1996

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Application made after filing of defence — Whether there was inordinate delay — Whether there was acceptable explanation for delay — Whether explanation can be made from the Bar or should be by way of affidavit evidence — Rules of the High Court 1980 O 14*

This was an appeal against the order of the senior assistant registrar granting summary judgment for Loo Sze Kin ('the plaintiff') against her husband Cheong Choy Teik ('the defendant'). Two issues were raised in this appeal, namely: (i) whether the court was precluded from considering the merits of the plaintiff's application for summary judgment when the application was not made timeously and there was no explanation for the delay; and (ii) whether the explanation for the delay might be given from the Bar.

Held, allowing the appeal with costs:

(1) The plaintiff must explain the delay in applying for summary judgment after a defence had been delivered. In this case, as no explanation was given for the delay, the plaintiff's application for summary judgment should have been dismissed (see p 540B–E); *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 followed.

(2) A statement made from the Bar amounted to the giving of evidence on behalf of the client but such statement was not given on oath and should not be accepted. In this case, the senior assistant registrar erred in accepting the explanation from the Bar made by counsel for the plaintiff (see p 544B–D); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 followed; *Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors* [1986] 1 CLJ 89 not followed.

Obiter:

If unexplained delay defeated an otherwise meritorious O 14 application, it would mean that: (i) the courts would have to try cases which were absolutely indefensible; (ii) thus rewarding the delinquent lawyer who did not apply punctually for summary judgment since he would be paid more for prosecuting a claim to judgment after a trial than prosecuting a claim to summary judgment; and (iii) punishing the litigant for the fault of his lawyer which would work an injustice to the litigant (see p 542F–H); *McLardy v Slateum* (1890) 24 QBD 504 not followed. Order 14 of the Rules of the High Court 1980 must therefore be read, in order to achieve its true objective, to mean that an application for summary judgment could be made at any time

after an appearance had been made. It could only be hoped that there would be a change of view from the highest court of the land (see p 543D–E). A

[Bahasa Malaysia summary

Ini adalah satu rayuan terhadap perintah penolong kanan pendaftar yang membenarkan penghakiman terus untuk Loo Sze Kin ('plaintif tersebut') terhadap suaminya Cheong Choy Teik ('defendan tersebut'). Dua isu telah dibangkitkan di dalam rayuan ini, iaitu: (i) sama ada mahkamah dihalang daripada mempertimbangkan merit permohonan plaintif untuk penghakiman terus apabila permohonan itu tidak dibuat secepat mungkin dan tiada penjelasan diberi tentang kelewatan permohonan itu; dan (ii) sama ada penjelasan tentang kelewatan boleh diberi oleh peguam semasa perbicaraan. B C

Diputuskan, membenarkan rayuan dengan kos:

(1) Plaintif patut menjelaskan kelewatan dalam memohon untuk penghakiman terus setelah pembelaan telah dikemukakan. Di dalam kes ini, oleh kerana tiada penjelasan diberikan untuk kelewatan itu, permohonan plaintif untuk penghakiman terus sepatutnya ditolak (lihat ms 540B–E); *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 diikut. D E

(2) Satu pernyataan yang diberikan oleh peguam semasa perbicaraan sama seperti pemberian keterangan bagi kliennya tetapi pernyataan sedemikian tidak diberikan atas ikrar dan tidak patut diterima. Di dalam kes ini, penolong kanan pendaftar telah tersilap ketika menerima penjelasan yang diberikan oleh peguam plaintif semasa perbicaraan (lihat ms 544B–D); *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 diikut; *Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors* [1986] 1 CLJ 89 tidak diikut. F

Obiter:

Jika kelewatan yang tidak dijelaskan menewaskan suatu permohonan A 14 yang mungkin bermerit, ini akan bermakna bahawa: (i) mahkamah akan terpaksa membicarakan kes yang tidak dapat dipertahankan sama sekali; (ii) lantas memberi ganjaran kepada peguam yang cuai yang tidak memohon mengikut masa untuk penghakiman terus memandangkan yang beliau akan dibayar lebih untuk mendakwa suatu tuntutan sehingga penghakiman setelah perbicaraan berbanding dengan membuat tuntutan penghakiman terus; dan (iii) menghukum pihak litigan untuk kesalahan peguamnya yang merupakan suatu ketidakadilan kepada pihak litigan (lihat ms 542F–H); *McLardy v Slateum* (1890) 24 QBD 504 tidak diikut. Aturan 14 Kaedah-Kaedah Mahkamah Tinggi 1980 oleh itu mesti dibaca, supaya mencapai objektifnya yang sebenar, untuk membawa maksud bahawa suatu permohonan untuk penghakiman terus boleh dibuat pada bila-bila masa setelah kehadiran telah dibuat. Cuma boleh diharapkan bahawa mahkamah tertinggi negara ini akan bertukar pandangan (lihat ms 543D–E).] G H I

Notes

For cases on delay in applying for summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3297–3310.

For a case on whether oral evidence may be given to explain the delay, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3299.

Cases referred to

Jacobs v Booths Distillery Co (1901) 85 LT 262 (refd)
Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134 (folld)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1(refd)
Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors [1986] 1 CLJ 89 (not folld)
McLardy v Slateum (1890) 24 QBD 504 (not folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (folld)
Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 117 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 1(1), O 14 r 2(1)

Ram Singh (*Shelley Yap Leong Chong Tseu Chia & Co*) for the appellant.
Norbet Yapp (*Jayasuriya Kah & Co*) for the respondent.

Cur Adv Vult

Ian Chin J:

Introduction

This is an appeal against the order of the learned senior assistant registrar, dated 24 November 1995, granting summary judgment to Loo Sze Kin ('the plaintiff') against her husband Cheong Choy Teik ('the defendant') for the sum of RM304,481. One of the issues was whether the court was precluded from considering the merits of the plaintiff's application for summary judgment when the application was not made timeously and there was no explanation for the delay. It is that issue that I will address first.

Whether delay and lack of explanation defeats summary judgment

The relevant rules governing an O 14 application in rr 1(1) and 2(1) are in these terms:

> 1(1) Where in an action to which this rule applies, a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

> 2(1) An application under r 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim or part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

It will be noted that the above rules do not spell out the time in which the application must be made (and thus do not prohibit an application after a defence is filed (*Janab's Key to Civil Procedure in Malaysia and Singapore* (2nd Ed) p 413), let alone proscribing an application (without any explanation as to why the application was not made earlier) after a defence is delivered. Why then should there be an explanation as to why the application was not made earlier when the rule does not prohibit an application to be made after a defence is filed nor prescribe the time within which the application must be made after a defence is filed? Our courts seem to be of the view that the case of *McLardy v Slateum* (1890) 24 QBD 504 lays down the requirement that a plaintiff applying for summary judgment after a defence is delivered must explain to the satisfaction of the court the delay in making the application, and the first time our highest court dealt with the issue was in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134. That was a case where the application for summary judgment was made about one month and two weeks after an appearance was entered but no defence was filed and the (then) Supreme Court said at p 135:

> ... the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267.
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> In the present appeal, no defence was ever filed by the appellants and other defendants. All that the respondents did before applying for the judgment was to await the next move to be made by the appellants and their co-defendants after appearances had been entered by them. We do not think that the delay in this case is such as to inhibit the court from granting the respondents' application for an O 14 judgment.

The case of *McLardy v Slateum* which the Supreme Court relied on has to be examined to determine its rationale. The facts of that case were summarized there in this way at p 504:

> This was an action to recover a sum of 129*l* for principal and interest. The writ was specially indorsed, and the defendant in the ordinary course delivered a defence. About a month after the defence was delivered the plaintiff applied for judgment under O 14, and a master made an order giving the defendant leave to defend upon paying the whole amount into

court. Upon appeal, Field J set aside the master's order upon the ground that an application under O14 could not be made after delivery of defence.

In that case, counsel for the plaintiff argued that the wordings of the rule did not justify the construction that a summons for summary judgment could not be taken out after a defence was filed and that such a construction would allow a defendant to always defeat the right of the plaintiff to obtain summary judgment by delivering a defence as soon as he entered an appearance. As against this, counsel for the defendant argued that an order for summary judgment would have the effect of striking out the defence which the rules did not empower the court to do. It was against this backdrop of facts and arguments that Pollock B delivered the following judgment at p 506:

> This is an appeal from an order of Field J at chambers, setting aside an order of a master who, upon an application under O 14, had given the defendant leave to defend upon paying the amount of the claim into court.
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> The order of Field J proceeded upon his view of the proper construction of O 14 r 1, namely, that the plaintiff was bound to make his application for summary judgment before the defendant had put in any statement of defence.
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> We took time to consider our judgment, principally because we were desirous of ascertaining what was the practice followed by other judges and by the masters, in consequence of being informed by counsel that Field J had long ago decided, in an unreported case, that the application must be refused if made after delivery of a statement of defence. We have made those inquiries and learn that the view of Field J still is that the intention of O 14 was that the plaintiff must take his application before delivery of a statement of defence; but that in peculiar circumstances, it may be made after, as where the defendant has delivered his defence before the expiration of the usual time, for the very purpose of defeating such an application. The view taken by other judges and by the masters is that the intention of O 14 r 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant but that it very often happens that a defence which has been delivered, itself discloses facts which make an application under O 14 right and proper. We think that this is the proper construction of the rule.
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> Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O14 r 1 because a defence has been delivered. The master was right in considering the facts and making an order and this appeal must be allowed.
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> If a plaintiff makes this application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

The issue there came up for argument soon after the said English O 14 was introduced and the court there, as a matter of construction, came to those decisions. In coming to that construction, the court had supplied a lot of words to the rules which are not there but the court can do that if it

promotes 'the general legislative purpose' as was said in *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 at p 124: A

> It has been said that since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': *Coke 4 Inst 330.* Indeed, this is the approach we adopt in this reference. In *Northman v Barnet Council* [1978] 1 All ER 1243, Lord Denning MR stated (at p 1246): B
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> > 'In all cases now in the interpretation of statutes, we adopt such a construction as will "promote the general legislative purpose underlying the provision". It is no longer necessary for judges to wring their hands and say: "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, C the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.'

Therefore, when construing the said rules, the purpose or objective of the said rules must be borne in mind. It will be observed that when construing D the said rules, the court in *McLardy v Slateum* did not advert to the very important consideration of the objective which the said rules sought to achieve which objective or intention was stated by Halsbury LC in *Jacobs v Booths Distillery Co* (1901) 85 LT 262 (HL) as follows:

> There is something too plain for argument; and when there were pleas put E in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, O 14 was intended to put an end to the state of things, and to prevent sham defences, from defeating the right of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Therefore, no construction of the said rules should have the effect of F defeating the objective for which the said rules sought to achieve and any construction having that effect cannot be valid. If unexplained delay defeats an otherwise meritorious O 14 application which *McLardy v Slateum* and all those cases that relied on it so decided, it would mean that: (i) the courts will have to try cases which are absolutely indefensible; (ii) rewarding G the delinquent lawyer who did not apply punctually for summary judgment since the lawyer will be paid more for prosecuting a claim to judgment after a trial than prosecuting a claim to summary judgment, and all these at the expense of not only the litigants but the taxpayers as well, since judges and public servants would be engaged in hearing the case; and (iii) punishing the litigant for the fault of his lawyer which works an injustice to H the litigant. All these would defeat the objective of the said rules in putting an end to sham defences, of preventing the defeat of the rights of the parties by delay and of preventing great loss to the plaintiff who endeavours to enforce his right. I will also add that it will add to the backlog and to the list of cases which would not see the door of the court let alone enjoy a I trial. The said rules must therefore be read, in order to achieve its true objective, to mean that an application for summary judgment can be made at any time after an appearance has been made. The words in the said rules are plain enough and there is no justification for importing into the said

rules provisions requiring: (i) the application to be made before the defence is delivered; and (ii) an explanation why the application was not made before the defence was delivered when such extension of the said rules defeats the objective of the said rules of preventing delay and which has the result, for the reasons I have earlier stated, of rewarding the delinquent and punishing the innocent. Since such a construction of the said rules works great injustice to the innocent litigant, the court should be disinclined to so construe (*Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1). The Rules of the High Court 1980 have undergone a lot of changes since the decision of *McLardy v Slateum*, the most important of which is to do away with the rules which made non-compliance fatal. Surely, the Rules of the High Court 1980 must be construed in the circumstances existing in 1980 and must take into account that non-compliance of the rules does not render proceedings a nullity, which was not so in 1890 when *McLardy v Slateum* was decided. I am respectively of the view, and for the reasons I have earlier stated, that *McLardy v Slateum* cannot be a sound decision for our courts to follow. Unfortunately, the Supreme Court in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* clearly stated that a plaintiff must explain the delay in applying for judgment after a defence has been delivered, which decision seems to imply that an application made one day after the filing of the defence would still be considered a delayed application requiring an explanation resulting in precious time being wasted in arguments as to whether the one-day delay is acceptable or not while forsaking the primary and in fact the only consideration, whether there is any defence or not. Much as I disagree, I must follow *Krishnamurthy & Anor v Malayan Finance Corp Bhd* and can only hope and yearn for a change of view from the highest court of the land. Speaking generally and not in reference to the present case, which I have not gone into the merits, it is of great mental anguish for a trial judge like myself to have to hear a case where there is no valid defence but which has to be tried because an application for summary judgment was not made timeously. With that remark, I turn to the question of the manner in which a delay should be explained.

Whether explanation for delay can be given from the Bar

An explanation was offered by Mr Norbert Yapp, counsel for the plaintiff, by making a statement from the Bar and this was accepted by the senior assistant registrar. Mr Ram Singh, learned counsel for the defendant, maintained that the explanation must be by way of affidavit and cited *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 where it was said at p 287:

> The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and the explanation is in reality that of counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act, as the learned judicial commissioner did in this case, is to ignore the very basic tenets of

> the law of evidence that are applied by our courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here, does little to advance the course of justice according to the law.

It appears from that case that the statement from the Bar was equated with giving evidence and the court there expressed its disapproval of such a course. By implication *Malayan Finance Corp Bhd v NKM Credit Sdn Bhd & Ors* [1986] 1 CLJ 89, where an explanation by way of a statement from the Bar was accepted, is disapproved and should no longer be relied on even though the case was not cited. The reason for disapproval in *Ng Hee Thoong & Anor v Public Bank Bhd* of accepting an explanation from the Bar is that such explanation amounted to giving evidence on behalf of the client and such explanation was not given on oath. Thus, on that authority, the learned senior assistant registrar therefore erred in accepting the explanation from the Bar of counsel for the plaintiff. This meant there was no explanation for the delay and on the authority of *Krishnamurthy & Anor v Malayan Finance Corp Bhd* and *Ng Hee Thoong & Anor v Public Bank Bhd*, the plaintiff's application for summary judgment should have been dismissed. I therefore allowed the appeal with costs to the defendant and set aside the judgment entered against the defendant.

Directions for trial

Pursuant to O 14 r 6 of the Rules of the High Court 1980, the following directions for trial are given:

(1) the plaintiff and the defendant shall, within 14 days hereof, serve on each other a list of documents verified by affidavit with inspection to be carried out within seven days of the service of the list;

(2) the plaintiff and the defendant shall, within 14 days hereof, serve on each other a notice to admit facts, a notice to admit documents and a notice to produce;

(3) the parties are, where possible, to agree on a statement of agreed facts;

(4) counsel for the parties shall settle a statement of issues to be tried and lodge the same with the court two days before the date of trial; and

(5) the trial of this action shall commence on 25 June 1996 at 9am and to continue from day to day until its conclusion.

Appeal allowed.

Reported by Ng Kian Pin